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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 315

HENRY J. LAQUE, JR.,
Petitioner,

v.

STATE OF MARYLAND,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

AVNET AND AVNET,
I. DUKE AVNET,
220 E. Lexington Street,
Baltimore 2, Maryland,
Counsel for Petitioner.

The Daily Record Co., Baltimore 3, Md.

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

TO THE HONORABLE, THE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Henry J. Laque, Jr., respectfully prays that a writ of certiorari be granted to review the final judgment of the Court of Appeals of Maryland, which was entered in the above case on May 16, 1955.

CITATION TO OPINION BELOW

The trial court of original jurisdiction, the Circuit Court for Anne Arundel County did not deliver any opinion in the case. The opinion of the Court of Appeals of Maryland, which is the highest Court of the State of Maryland, from which opinion a review is sought, is reported in 113 A. 2nd 893, ... Md. .... (1955); this opinion appears in Appendix B of this petition (R. 130½-143).

license in 1953 when he was informed such was necessary but was turned down.

The Petitioner was arrested and charged with operating a junk or salvage yard in violation of the ordinance on five separate occasions in 1954.

At the outset of his trial, there was filed and argued on behalf of the Petitioner a Motion To Dismiss which, among other things, challenged the constitutionality of the ordinance on the ground of its repugnancy to the Federal Constitution because it deprived him of property rights without due process of law (R. 19). The Petitioner thus "specially set up or claimed" a federal right, privilege or immunity. The trial Court, after argument, overruled the Motion To Dismiss (R. 20).

During the course of the trial, the Court, over Petitioner's objections, permitted the Respondent to introduce testimony and evidence concerning an application made by the Petitioner in 1953 to the Planning Administrator for a certificate of occupancy on the said premises as a non-conforming use for a salvage or junk yard, and the Court further permitted the Respondent to offer evidence about the rejection of the application and the finding against Petitioner on this issue by the Planning Administrator and, on appeal, by the Board of Zoning Appeals and by the Circuit Court for Anne Arundel County (R. 55-58). The Court, over Petitioner's objections, allowed Respondent to introduce into evidence as exhibits a copy of the findings, reasoning and decision of the Board of Appeals and a copy of the order of the Circuit Court for Anne Arundel County in this connection (R. 58, 59).

The Court refused to allow the Petitioner to offer corroborating proof through a disinterested witness that he had carried on a used automobile parts salvage business

on the property continuously from 1946 to the date of the trial, October 13, 1954; and thus he could not show that he had a non-conforming use as a salvage business (R. 81, 82). The Court's rulings had the effect of foreclosing the Petitioner from presenting evidence about his occupancy of the premises as a non-conforming use because this issue had been previously decided against him in the proceedings just referred to before the Planning Administrator and on the appeals therefrom (R. 15, 17, 73, 74). This was the Court's position even though the findings of the Board of Appeals was confined to the facts existing only up to December 2, 1947 (R. 10, 15). The Petitioner was being prosecuted under a specific section of a 1952 zoning ordinance namely, Section IV-C-1(d) of the Zoning Ordinance of Anne Arundel County, and was prevented from showing what his business operation was up to the date that this particular ban on salvage and junk yards went into effect namely, July 1, 1952 (R. 5, 34, 40, 46, 73, 74).

The Court rejected a jury prayer submitted by the Petitioner to the effect that if the jury found that the Petitioner operated a junk or salvage yard on the property before the ordinance imposing the ban on such operations went into effect that this constituted a good defense to the charges (R. 18).

The question of vested rights vis-a-vis the zoning ordinance was thus again raised at the close of the case in the trial Court.

After conviction on all of the charges, the Petitioner appealed to the Court of Appeals of Maryland and in his Brief specifically raised the question of the validity of the ordinance and of its application to him in these cases and charged that his conviction thereunder "is to deprive him of his property rights in violation of the 14th Amendment

to the Federal Constitution" (Point 6 at p. 13 of Appellant's Brief in the Court of Appeals of Maryland, copies of which are furnished with this Petition).

Petitioner in his Brief in the Appellate Maryland Court drew into question the refusal by the trial Court to allow the Petitioner to present witnesses to establish a non-conforming use and raised the question of Respondent's introduction into evidence of rulings in a previous civil case to disprove a non-conforming use. This, charged the Petitioner, was "a denial of due process of law under the 14th Amendment to the Federal Constitution since the application of the ordinance in this way was unlawful and constituted the illegal destruction of Appellant's property rights" (Point 6, pages 13 and 14 of Appellant's Brief in the Court of Appeals of Maryland).

Finally, the Maryland Court of Appeals in its opinion stated:

> "Before the cases went to trial before the jury the appellant filed a motion to dismiss, which was denied, in which he asserted that he was not a proper party defendant, that the 'ordinance and/or statute under which he has been charged' violated the Constitutions of the United States and of Maryland and specifically asserted that 'it' deprived him of property without due process of law * * *" (Appendix p. 13).
>
> " * * * The appellant's principal argument is that he should be permitted in this case to relitigate the question of whether or not he had established a non-conforming use of the property as a salvage or junk yard. As already pointed out, he selects July 1, 1952, as the decisive date; but because of the definition of a 'lawful non-conforming use' we think that December 2, 1947, is the controlling date on this point. He asserts that he has been deprived of a constitutional right, because he was not permitted to relitigate this question so fully as he wishes to. We do not agree" (Appendix p. 18).

"* * * The point at issue is really not one of protecting a judgment from collateral attack; the question is simply whether or not he has been deprived of an opportunity to assert in a judicial proceeding a right which he claims and has thereby been denied due process of law. We think that clearly he has had such an opportunity. See *Yakus v. U. S.*, 321 U. S. 414" (App. 18).

"* * * We are not prepared to hold that on their face these explicit provisions are so arbitrary or unreasonable as to be void, and we do not find any deprivation of any constitutional right of the appellant by reason of the 'special exception' permit requirements of the ordinance" (App. 20).

These portions of the opinion of the high Maryland Court indicate quite clearly that it considered a Federal Constitutional question to have been raised. The first excerpt specifically mentions the federal question. While the Maryland constitution has a due process clause analagous to that of the Federal Constitution (Art. 23 of the Declaration of Rights) the federal right and the state right are so close in their relationship that involvement of the one must of necessity involve the other and therefore they are not independent of each other. This Court has said:

"Where the non-Federal ground is so interwoven with the other as not to be an independent matter . . . our jurisdiction is plain."

Enterprise Irrig. Dist. v. Farmer's Mut. Canal Co., 243 U. S. 157, 164.

REASONS FOR GRANTING THE WRIT

The Maryland Court of Appeals has decided a federal question of substance "in a way probably not in accord" with the applicable law of the Supreme Court of the United States. In the case of *Dobbins v. City of Los Angeles*, 195 U. S. 223, 239; 25 S. Ct. 18; 49 L. Ed. 169, this Court held

that where a zoning ordinance was amended to ban manufacturing plants in a certain area after the defendant had started construction of his plant there, the amended ordinance was unconstitutional because of the 14th Amendment to the Federal Constitution and that a criminal prosecution for violation of such an unlawful ordinance constituted illegal destruction of property rights and could be reached by a court of equity.

It is well established that a non-conforming use is a vested right and is entitled to constitutional protection. *Dobbins v. City of Los Angeles*, supra. *Amereihn v. Kotras*, 71 A. 2nd 865, 194 Md. 591. The effect of zoning regulations is in the future and their operation is prospective, to protect and preserve and not to destroy. *Amereihn v. Kotras*, supra; *Francis v. MacGill*, 75 A. 2nd 91, 196 Md. 77.

The ordinance in the present case is retroactive in its application because it may reach back from July 1, 1952, when the ban on junk and salvage yards was adopted, to December 1, 1947 when the ordinance was, apparently, originally enacted (App. 11, Sec. I B /an/). In this way it may destroy vested rights in the form of a non-conforming use namely, a junk or salvage yard which was in operation before the date of the ban. This was actually done to the Petitioner by criminally punishing him for the operation of his business. His testimony that he operated an automobile salvage parts yard between December 1, 1947 and July 1, 1952 went uncontradicted. If this decision is permitted to stand then it is a precedent which could be used by other local bodies throughout the nation to reach back many years in applying a newly adopted zoning amendment and create untold destruction of vested property rights. There is a matter of substance involved.

The validity of the ordinance was attacked also on the ground that it is too vague and indefinite to permit of

proper enforcement (Appellant's brief in Court of Appeals of Maryland, p. 7; Petitioner's Motion to Dismiss). The wording is so broad as to empower the Board of Zoning Appeals to reject special approval for the operation of a junk or salvage yard — "Where the general welfare, in the judgment of the Board of Appeals, will not be injured by proximity to populated areas or other circumstances." It is well established that the test whether a law is within the ambit of constitutional prohibitions is determined by what *can* be done rather than what will be done under it. *State v. Petrushansky*, 36 A. 2nd 533, 183 Md. 67; *Grate v. Rogers*, 149 A. 547, 158 Md. 685. Since this ordinance is capable of being administered partially or unreasonably, it is not a valid ordinance. *City of Hagerstown v. B. & O.*, 63 A. 490, 107 Md. 178.

The Petitioner was denied the right to present evidence through witnesses about the existence of his business in the area in question before the date of the zoning ban on July 1, 1952. This prevented him from successfully establishing a non-conforming use which would have been a complete defense. The trial Court's ruling in respect to this vital evidence denied him his day in Court or the right to a fair trial. By this lack of due process he was deprived of the legality of a non-conforming use or a vested property right in violation of the 14th Amendment.

The admission into evidence of the proceedings and adverse rulings in the previous civil hearing before the Zoning Board and the Circuit Court for Anne Arundel County respecting a certificate of occupancy as a non-conforming use was obviously prejudicial and prevented the Petitioner from getting a fair trial in the criminal case.

The great weight of legal authority holds that a judgment in a civil action is inadmissible in a subsequent criminal

prosecution for the purpose of proving facts adjudicated thereby even though the same questions are in dispute in both cases; the rationale of these decisions is that the parties are not the same and a different quantum of proof applies since merely a preponderance of the evidence is required to prevail in a civil action whereas guilt must be proved beyond a reasonable doubt in a criminal case. *U. S. v. Satuloff Bros.*, 79 F. 2nd 846 (C.C.A. N. Y.); *People v. Barker*, 77 P. 2nd 321, 29 Cal. App. 2nd Supp. 760; *State v. Dubose*, 11 So. 2nd 477, 152 Fla. 304; *State v. Snyder*, 104 N. E. 2nd 169, 157 Ohio St. 15; *State v. German*, 90 P. 2nd 185, 162 Oregon 166; *Hodges v. State*, 222 P. 2nd 386, Okla. Cr. App.; *Helms v. State*, 45 So. 2nd 171, 253 Ala. 467; *State v. Weil*, 65 S. E. 634 (S. C.) 26 L. R. A. N. S. 461; *Busby v. State*, 103 S. W. 638 (Tex.).

A similar principle was applied in a zoning ordinance case (See *Fleetwood Manor, Inc. v. Village of Huntington Bay*, 115 N. Y. S. 2nd 615). The admission of this prejudicial evidence was responsible for the convictions and constituted a deprivation of vested property rights without due process of law.

CONCLUSION

For the foregoing reasons, this writ of certiorari should be granted.

And your Petitioner will ever pray.

Respectfully submitted,

AVNET AND AVNET,

I. DUKE AVNET,
220 E. Lexington Street,
Baltimore 2, Maryland,
Counsel for Petitioner.

APPENDIX A

Zoning Ordinance of Anne Arundel County, Maryland, as Amended on July 1, 1952

I. General

A. Purpose in view:

For the purpose of promoting the general welfare of the county, of improving health, of enhancing safety from fire, panic and other dangers; of reducing traffic congestion; of providing adequate light and air; of preventing the overcrowding of land and the undue concentration of population and of abetting provision of schools, parks and public facilities, the County Commissioners of Anne Arundel County hereby enact this ordinance to control, within Anne Arundel County the repair, alteration and construction of buildings and structures and the occupancy of land, buildings and structures by regulating the density of population; by regulating, of buildings and structures, their locations, minimum frontage, bulk or size, heights, and uses for agricultural, residential, commercial, industrial, recreational and other purposes and by regulating, of land, the uses for agricultural, residential, commercial, industrial, recreational and other purposes, the depths of lots, the areas of lots, the building line or lots, the percentage of lots occupied, and the size of yards and courts.

B. Definitions:

* * * * * *

4. Special terms. The following terms where occurring in this ordinance shall have the meanings specified below.

* * * * * *

(al) Junk or Salvage Yard: Any land or area used, in whole or in part, for storage of paper, rags, scrap metal or other junk or for the storage of automobiles not in running condition or for the dismantling of automobiles or other vehicles or machinery.

* * * * * *

(an) Lawful Non-Conforming Use: Any lawful use existing prior to the initial passage of the zoning ordi-

nance and contrary to the zoning restrictions of said ordinance.

* * * * * *

C. Permits Required:

* * * * * *

2. Use or Occupancy Permits:

* * * * * *

(b) *Land* — No land may hereafter be used for other than agricultural or residential uses or accessory uses therefore until and unless the use in question is authorized by the issuance of a Certificate of Occupancy therefore as above set forth.

* * * * * *

IV. Board of Appeals

* * * * * *

C. Powers of the Board of Appeals are as follows:

1. The Board shall have the power to hear and decide, in accordance with the provisions of this Ordinance, request for special exceptions or for interpretation of the zoning map or for decisions upon other special questions upon which the Board is authorized to pass. The special exceptions are as follows:

* * * * * *

(d) Junk or salvage yards.

* * * * * *

V. Enforcement and Remedies

Any person, firm or corporation violating any of the provisions of this Ordinance or any conditions imposed by the Board of Appeals shall be deemed guilty of a misdemeanor and upon conviction thereof in a court of competent jurisdiction shall be fined not less than twenty-five (25) dollars nor more than one hundred (100) dollars for each violation committed, each days continuance of a violation constituting a separate offense, or, if a person, he shall be imprisoned not more than six (6) months, or both so fined and imprisoned, within the discretion of the court.

* * * * * *

APPENDIX B

Opinion, Court of Appeals of Maryland

The Court of Appeals of Maryland

No. 107, October Term, 1954

Henry J. Laque, Jr.

v.

State of Maryland

Brune, C. J., Delaplaine, Collins, JJ.

Opinion by Brune, C. J.

Filed: May 16, 1955

On August 2nd, 1954, five separate warrants were issued by a trial magistrate of Anne Arundel County for the arrest of the appellant on charges that on each of five different dates (April 13, April 22, May 11, July 2 and July 29, all in 1954) at premises on Belle Grove Road, in that County, he "did unlawfully operate a junk and/or salvage yard in violation of Section IV-C-1(d) of the Zoning Ordinance of Anne Arundel County." In each case the appellant prayed a jury trial, the case was transferred to the Circuit Court for Anne Arundel County and the appellant was found guilty by the jury in each case. In one case he was sentenced to a fine of $25 and costs and to six months in jail, the jail sentence to be suspended upon payment of the fine and costs, and the appellant was placed on probation. In three of the other cases he was fined $25 and costs, and in the fourth he was fined $100 and costs.

Before the cases went to trial before the jury the appellant filed a motion to dismiss, which was denied, in which he asserted that he was not a proper party defendant, that the "ordinance and/or statute under which he has been charged" violated the Constitutions of the United States and of Maryland and specifically asserted that "it" deprived him of property without due process of law, denied him the equal protection of the laws and operated

against him as an ex post facto law. He further asserted that the statute and ordinance are too vague and indefinite to be valid, that the "exercise and application of the ordinance and/or statute" violated his constitutional rights and privileges, that the application of the "ordinance and/or statute" constituted an abuse of the power and discretion vested in the persons enforcing the "ordinance and/or statute" and that the charges were so vague and indefinite as to make it impossible for the accused to be informed of the charges against him and thereby prevented him from properly making a defense thereto.

Turning back to the terms of the warrant we note that the defendant is charged with operating "a junk and/or salvage yard in violation of Section IV-C-1(d) of the Zoning Ordinance of Anne Arundel County." The testimony shows that part of the appellant's property is zoned "heavy commercial", part as "agricultural" and a small part as "cottage residential". The Zoning Ordinance does not permit a junk or salvage yard to be located in any area zoned under any of these classifications unless either (1) such a "lawful non-conforming use" existed on the effective date of the Ordinance, July 1, 1952 (See Section I-D), or (2) in the case of property zoned as "heavy commercial" and meeting certain other requirements, a "special exception" allowing such use is granted by the Board of Appeals. (See Section IV-C-1(d).

Section IV-C-1(d) reads as follows:

"C—Powers of the Board of Appeals are as follows:

1. The Board shall have the power to hear and decide, in accordance with the provisions of this Ordinance, requests for special exceptions or for interpretation of the zoning map or for decisions upon other special questions upon which the Board is authorized to pass. The special exceptions are as follows:

* * * * * *

(d) Junk or Salvage yards.

* * * * * *

The following minimum standards shall be met by each application for any special exceptions above listed:

* * * * * *

(d) For Junk or Salvage Yards such a use may be authorized:

1. Only in a heavy commercial or industrial zone.

2. Where the yard itself be invisible from and at least three hundred (300) feet distant from any state or county highway.

3. Where the general welfare, in the judgment of the Board of Appeals, will not be injured by proximity to populated areas or other circumstances."

The prohibitions against junk yards in areas zoned as "agricultural", "cottage type residential", and "heavy commercial" are contained in Section II A 1(b)(1), Section II B 2 a (2)(1) and Section II E 1 (b)(1), respectively. The provisions of Section IV-C deal with the powers of the Board of Appeals and sub-division 1(d) thereof deals only with limitations on the power of the Board to grant "special exceptions" for the use of property as a junk yard or salvage yard. The charge in the warrants has been treated by the appellant, and also by the State, as sufficient to set forth an offense. The appellant's brief states that "In this case, Appellant was being prosecuted criminally under the penalty section of the ordinance which makes it a misdemeanor to operate a salvage or junk yard without approval by the Zoning Board."

Grammatically, the charge in the warrants is open to serious criticism since the appellant obviously could not, by operating a junk yard, violate provisions of the ordinance defining or limiting the powers of the Board to grant a permit or "special exception" to operate one. However, the elliptical form in which the charge is stated does not appear to have misled the appellant, as is indicated by his construction of the warrants, as stated in his brief; and he has not raised either in the trial court or in this Court any objections to the warrant on the grammatical grounds which

we have noted. Had they been raised in the trial court it appears that the charges could have been corrected by amendment of the warrants at any time before final judgment under Code (1951), Article 52, Section 20. The case was tried upon the meaning of the charges as stated in the appellant's brief; and so construed, they do state an offense under the Zoning Ordinance. This construction, we think, is sustainable, though the matter has presented considerable difficulty, and this form of expressing a charge is one which is certainly not to be recommended.*

There are two different bases upon which the sanction of the Board of Appeals might be obtained for the operation of a junk yard or salvage yard. One is that of a lawful non-conforming use; the other is a "special exception".

Section I-D of the Zoning Ordinance provides that "A lawful non-conforming use existing on the effective date of the adoption of these regulations may continue; * * *." That date was July 1, 1952. The appellant argues that this is the controlling date, but his argument overlooks the definition of a "lawful non-conforming use". This is set forth in Section I-B (a n) as "Any lawful use existing prior to the initial passage of the zoning ordinance and contrary to the zoning restrictions of said ordinance." The date of "the initial passage of the zoning ordinance" was apparently December 2nd, 1947. Under the amended ordinance adopted July 1, 1952, it was necessary for the appellant to obtain a "certificate of occupancy" for the use of the property as a junk or storage yard in order to continue such use. See Section I-C 2 (b). To obtain such a certificate, proof would be required of the non-conforming use on December 2nd, 1947, and of its non-abandonment for a period of as much as a year thereafter. The appellant sought such a certificate and the Board of Appeals held a hearing on his application, as a result of which it found that the alleged non-conforming use was not established and accordingly on December 4th, 1953, denied the application. The applicant then appealed

* See *Leet v. State*, 203 Md. 285, 289-290, 100 A. 2d 789, 791; *Hurwitz v. State*, 200 Md. 578, 92 A. 2d 575; Rule 3(b)(2) of the Rules of Criminal Procedure.

to the Circuit Court for Anne Arundel County, and the action of the Board of Appeals was affirmed by the Court on March 11th, 1954. Mr. Laque did not appeal from that decision to this Court.

The other possible form of approval which might be obtained for the operation of a junk or salvage yard is a "special exception". Such an exception is not permissible under the terms of the Zoning Ordinance unless the property in question is zoned as "heavy commercial" or "industrial" and then is permissible only if the yard is "invisible from and at least three hundred (300) feet distant from any state or county highway." The final clause of Section IV-C-1(d), paragraph (3), requires as an additional condition for the issuance of a special exception permit that, in the judgment of the Board of Appeals, the general welfare "will not be injured by proximity to populated areas or other circumstances." It is this last clause against which the appellant directs most of his attacks based upon constitutional grounds.

The record of the Board of Appeals hearing which was introduced in evidence shows that about a year before Mr. Laque's unsuccessful effort to establish a non-conforming use he had made an unsuccessful effort to obtain from the Board of Appeals a "special exception" to use his property for the salvage of automobile parts. There is nothing to indicate that he took any appeal from this adverse ruling of the Board.

It was thus established that the appellant had neither a certificate of occupancy showing a non-conforming use nor a "special exception" permit to operate a junk or salvage yard. Hence his operations, if they amounted to the maintenance or operation of such a yard, were in violation of the ordinance and neither of the possible exceptions was available to him. He testified in substance that he did not run a junk yard because his method of operation was merely to salvage and sell useable parts from old automobiles which remained only temporarily on his lot, and that when such parts had been sold he removed the automobile bodies to a junk yard. We think that this is too fine a distinction and

that, on his own testimony, he was maintaining and operating a junk or salvage yard.

The appellant's principal argument is that he should be permitted in this case to relitigate the question of whether or not he had established a non-conforming use of the property as a salvage or junk yard. As already pointed out, he selects July 1, 1952, as the decisive date; but because of the definition of a "lawful non-conforming use" we think that December 2, 1947, is the controlling date on this point. He asserts that he has been deprived of a constitutional right, because he was not permitted to relitigate this question so fully as he wished to. We do not agree.

The Zoning Ordinance of July 1, 1952, clearly recognized and offered protection to any lawful non-conforming use in existence on that date, and provided for the protection of such uses as had existed on December 2, 1947 and had not thereafter been abandoned. This Court has recognized that non-conforming uses are rights which are entitled to protection. *Amereihn v. Kotras*, 194 Md. 591, 71 A. 2d 865; *Higgins v. City of Baltimore*, ... Md. ....., 110 A. 2d 503. In neither of these cases did the provisions of the ordinance involved require any action on the part of the person claiming the use at a time material to the decision of the case. The 1952 Anne Arundel County Ordinance, unlike its 1947 predecessor, required "certificates of occupancy" for the use of land for other than agricultural or residential uses (or uses accessory thereto). It also makes provision for obtaining such certificates from administrative officials, and Section 614 of the Code of Public Local Laws of Anne Arundel County provided for judicial review of the action of the Board of Appeals. Mr. Laque followed these procedures, and he appealed from the Board of Appeals to the Circuit Court and he could have (but did not) appeal from the adverse ruling of that Court to this. He has had his day in court on his alleged constitutional rights, and the determination has been adverse to him. We know of no rule of law which requires that he be offered the right to relitigate the question as often as he pleases. The point at issue is really not one of protecting a judgment from col-

lateral attack; the question is simply whether or not he has been deprived of an opportunity to assert in a judicial proceeding a right which he claims and has thereby been denied due process of law. We think that clearly he has had such an opportunity. See *Yakus v. U. S.*, 321 U. S. 414.

The situation is simply that the appellant does not have a "certificate of occupancy" authorizing the use of the property as a junk yard. He has been afforded a full and fair opportunity to get one, including a judicial review of his application for it. The absence of such a certificate bars him from one of the two defenses which he might have under the ordinance. It so happens that this defense is outside the scope of Section IV-C-1(d); but if he had such a certificate it would be a defense against a charge based upon his operating a junk yard without a "special exception" permit from the Board, because no such permit would then be needed.

This reduces him to the one other possible defense — a "special exception" permit to operate a junk yard. It is perfectly clear that he does not have one. The ordinance offers him ample opportunity to get one by the same kind of procedures which were available to him in connection with his effort to establish a non-conforming use. The evidence shows that he tried to get one from the Board and that his application was denied. There is nothing to indicate that he took or attempted to take an appeal from the adverse decision. Every objection to Section IV-C-1(d) or its application which he urges here was available to him in those proceedings. The State urges that he is obligated to exhaust the administrative remedies available to him and thereafter to pursue the statutory method of appeal and judicial review which was available to him under the procedure provided by Article 66B of the Code and the ordinance, and denies his right to make a collateral attack on the ordinance as a defense to a criminal prosecution. In this contention it relies largely on *Kahl v. Consolidated Gas Elec. Lt. & Power Co.*, 191 Md. 249, 60 A. 2d 754; *Applestein v. Baltimore*, 156 Md. 40, 143 A. 666 and *Anne Arundel County v. Snyder*, 186 Md. 342, 46 A. 2d 689. None of those

cases was a criminal case and they are therefore not directly in point. However, where, as here, there was ample opportunity to present and litigate all of the contentions now presented, we think the same reasoning is applicable. See also *Yakus v. U. S., supra.*

Even if this rule were not applicable, it would seem that in order to present an adequate defense to the charge of operating a junk yard without a "special exception" permit, the appellant would have to show at least that the challenged portion of the ordinance is invalid and that he is entitled to proceed without a permit thereunder. He would promptly encounter two obstacles: first, the separability clause of the ordinance; and, second, the perfectly clear and explicit requirements that a junk yard must not be visible from a State or County highway *and* must be at least 300 feet distant from one. The evidence seems to show rather clearly that the portion of the appellant's tract used for the purposes charged fronts on a public street and is 200 feet in depth. The argument of vagueness which the appellant directs against the provision requiring consideration by the Board of "the general welfare" therefore need not be reached. The appellant has made no argument against the validity of the three hundred foot requirement and has merely questioned whether "an attractive fence" which would cut off visibility would satisfy the ordinance. There is no evidence that there was one at the time of the alleged offenses. We are not prepared to hold that on their face these explicit provisions are so arbitrary or unreasonable as to be void, and we do not find any deprivation of any constitutional right of the appellant by reason of the "special exception" permit requirements of the ordinance.

The appellant urges several other grounds for a reversal of the judgment.

One is the admission of the record of the proceedings before the Board of Appeals on his application for a certificate of occupancy. While there may be some question as to the admissibility of the entire record, we think that the order or resolution based thereon was admissible to negative one possible defense to the charge and that the admission of

the entire record is not shown to have been prejudicial to the appellant and his objection to its admission made at the trial appears to have been based on materiality rather than prejudice. For the same reason that we think the resolution of the Board was admissible we think the decree of the Circuit Court affirming the Board's action was admissible.

The appellant also complains that he was not allowed to testify in support of his claim that he had established a non-conforming use. The record shows that he did testify somewhat extensively on this subject. In addition, as what we have already said will indicate, it is not controlling in our view, whether the Board did or did not reach the correct conclusion on that subject; the important facts are that after a full hearing and after review of the Board's decision by the Circuit Court, he does not have a certificate of occupancy based upon an alleged non-conforming use and that neither the Board's action nor that of the Circuit Court in affirming the Board is before us for review in this case.

The appellant also objected to being required to go to trial in the absence of certain witnesses who had not been summoned. No explanation was offered as to why they had not been summoned earlier, despite the fact that it seems perfectly clear that the defendant had notice that his case was to come up on that day. Matters of continuance are ordinarily within the discretion of the trial judge and it has not been shown that he abused his discretion in this case. Compare *Plank v. Summers,* 205 Md. 598, 109 A. 2d 914. It appears, though it is by no means clear, that the absent witnesses were to be interrogated about the alleged non-conforming use. No amount of such testimony would have supplied the absence of the certificate of occupancy.

We are of the opinion that the judgment should be affirmed.

JUDGMENT AFFIRMED, WITH COSTS.